Supreme Court, U.S.
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No. 88-2120

In The

Supreme Court of the United States

October Term, 1989

EDWARD MERRILL, JOSEPH DE HOPE, VIRGINIA JOURIS, ROBERT ARRIGONI, HAROLD ZUCKERMAN, ALLAN J. PETERSDORF, JAMES COZENS,

Petitioners,

vs.

BOYER AUGUST,

Respondent.

On Petition For A Writ of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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I.

STATEMENT OF THE CASE

A. Introduction

In their Statement of the Case, petitioners set forth the factual background of this case in a manner which is unabashedly selective, biased, and misleading. While this might be acceptable practice in a closing argument before a jury, it is not an acceptable practice in a petition for certiorari, where the Court must rely on counsel's good faith in setting forth the record below. Respondent takes this opportunity to correct the inaccuracies and omissions in petitioners' Statement of the Case, as authorized by Rules 22.1 and 34.2 of the Rules of the Supreme Court of the United States.

Respondent's statement of the factual background of this case serves a second purpose. Inasmuch as respondent contends that petitioners seek review of issues which are primarily factual, and that the lower court decision is based on a set of facts which is complex and unique, respondent believes that it is appropriate to provide this Court with a brief summary of the mass of facts generated in the 24-day jury trial below.

B. Correction Of Inaccuracies And Omissions In Petitioners' Statement Of The Case

1. Public Controversy Had Surrounded The San Ramon School District for Several Years

Until 1975, the community of Danville was an intimate community. (RT. 1684:28-1685:23; 335:34-336:1.)[1] The

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[1] "RT." indicates Reporter's Transcript.
"CT." indicates Clerk's Transcript.

school board was the only local political entity, and people focused significant attention on school activities. (RT. 226:7-14; 227:11-20; 1685:28-1686:9.) Letters to the editor of local newspapers reflected community concerns. (RT. 1685:24-27; 362:25-365:2.)

The community had focused its attention on San Ramon High Principal James Cozens' lack of responsiveness to parent concerns, his closed mindedness, the influence of the Boy's Physical Education Department over him, his lack of awareness of what was happening on his own campus, his resistance to new ideas, and his reluctance to lead or direct his faculty and staff. (RT. 236:18-28; 91:24-92:26; 445:25-446:28; 1236:18-38; 1576:9-22; 1577:21-1578:22; 1676:9-22; 1688:2-1689:3; 1690:1-21; 1691:22-28.) Long before Boyer August came to San Ramon High, its faculty was badly divided, and "lacked cooperation and common direction." (RT. 304:12-20; 305:10-309:21; 465:2-466:28; 1634:6-1635:2.) Boyer August was not responsible for the basic and longstanding problems at San Ramon High School. (RT. 304:12-20; 1691:22-27.)

2. Respondent Addressed Issues Of Public Concern

Petitioners question some, but not all of August's activities found by the trial court to be constitutionally protected. (RT. 1959:20-1960:19.) This reply is limited to the issues raised in the petition.

a) Respondent's Letter to the Editor of the *Valley Pioneer*

Boyer August, an active community leader, was employed as dean of boys at San Ramon High School in

September, 1970. (RT. 216:21-221:20; 965:8-966:23; 968:10-969:3; 969:11-971:12.) In the spring of 1973, August and his wife wrote a letter to the editor of the *Valley Pioneer*, a local newspaper, in response to a parent's letter previously published. (RT. 995:1-996:18.) The parent's letter referred to the "Code of Ethics of the Teaching Profession," and observed: "The Code of Ethics should give us . . . an idea of what kind of conduct we have a right to expect from our teachers and their superiors. . . ." In reply, August encouraged parents to become involved and addressed "general areas" in which the profession could be encouraged to strive for excellence. He observed:

> In the field of administration, many individuals have spent years of their lives compromising their basic principles to achieve their goals of better position. By the time the goal is achieved, they are too weak, ineffective, and compromised to effect any change. Their best ideas and leadership qualities have been compromised from 'playing the game' to achieve the next position. In turn, many excellent teachers have succumbed in spirit and practice due to lack of integrity and enthusiasm in leadership.
>
> [Excerpts from Trial Exhibit 46; RT. 995:1-996:17.]

Principals and other administrators in the district met with the superintendent to discuss August's letter. (RT. 397:1-398:7; 997:4-999:12; 707:21-708:7; 723:12-23; 1001:4-1001:14.)

b) Parent and Student Rights Class

Following publication of his letter, August offered to teach a class in "Parent and Student Rights." When the school district rejected his proposal, he taught it at the local public library. August advocated responsible exercise of individual rights. (RT. 527:10-528:5.)

During the summer and fall of 1974, he was quoted in the local press. The purpose of his class, he said, was to help parents support programs that they approved of and to help them identify and correct problems they observed. (RT. 997:4-1001:3.) (Trial Exhibits 56, 62, 63, 66 and 67; RT. 752:5-755:19; 759:10-781:20.) (RT. 1801:7-17.) Although the administration monitored his class, they could find no fault with it. (RT. 1000:10-1001:3; 1023:1-25; 752:5-10; 1801:7-17.)

c) The "Green Valley Parents" Meetings

That summer, groups of parents from the Green Valley School had been meeting to discuss problems at their school. August had not been involved in the meetings. (RT. 1505:27-1506:8.) However, after one of August's classes, a Green Valley parent approached him and requested that he attend one of the meetings to explain the procedures which they could use in order to present their concerns to the school's administration. (RT. 487:12-16.) August advised her that while he was willing to explain the district's rules and regulations, he would not become involved in the individual problems of those attending the meetings. He thereupon notified the Green Valley principal, who voiced no objection, but thanked

August for informing him of the meetings. August's comments to the groups were factual and dealt with legitimate procedures available to the parents. He did not misrepresent district policy. The principal of the Green Valley School had not liked August's letter to the editor and did not like August meeting with parents whose children attended his school. Despite the fact that August shared with the parents the same information he had shared with his "Parent and Student Rights" class, the principal complained to the superintendent. (RT. 488:16-26; 489:14-491:28; 493:11-21; 1026:25-1027:22; 1028:1-1029:2; 1140:14-1142:21; 1499:5-13; 1498:12-18; 1503:7-12; 1504:25-1505:4; 1505:27-1506:8.)

d) Recommendations Regarding the Boys' Physical Education Program

The community was also concerned that the Boys' P.E. Department was given preferred treatment by the administration, and that some physical education teachers ridiculed and harassed students. (RT. 305:10-309:21; 684:22-685:14.) Between 1971 and 1973, members of the student government asked August to assist them in opening channels of communication with the Boys' P.E. Department. August arranged meetings between the students and the teachers, and wrote recommendations to the principal which expressed the students' concerns. (RT. 991:6-992:6; 1071:6-1072:7; 1073:22-1076:25; 1077:6-19; 1400:28-1402:15; Trial Exhibits 104 and 121.)

Indeed, after receiving the reports from August on the students' recommendations for change, Cozens

directed adoption of a number of the recommendations, including ultimately, the employment of an outside consultant to review the Boys' P.E. program *in toto*. (RT. 1415:6-1418:18.)

e) Criticism of James Cozens

By December of 1973, August had been witness to Cozens' lack of leadership for over three years. He felt professionally obligated to advise Cozens of his opinion that Cozens was not competent as principal. August was sensitive to and concerned for Cozens' personal welfare and feelings, and spoke to him about it only one time, privately, after school hours. He suggested, both for the benefit of the school and for Cozens' own well-being, that Cozens should leave his administrative post and return to the classroom. (RT. 1005:2-1006:18.) The only other persons aware of August's feelings were August's secretaries. He did not "publicize" his views. (RT. 1457:6-16; 1471:10-1472:6.)

Cozens accepted the concept that it was appropriate for a subordinate to express such opinions to his superior. (RT. 682:4-7; 682:23-683:15.) Although Cozens' feelings were hurt by the comments, the discussion did not alter August's and Cozens' working relationship. By Cozens' own estimation, August continued to serve as a professional, ethical, and reliable member of his management team. (RT. 791:25-794:2.)

f) Attempts to Persuade Cozens to Alter His Decision Regarding the Streaker

In February of 1974, a graduating senior had been selected by the industrial arts teachers to receive a Bank

of America Award, with the prospect of winning a college scholarship. (RT. 496:16-28.) The student's selection was publicized in the local press. (RT. 497:1-13; Trial Exhibit No. 91.) However, the award winner, an exemplary student, and another boy engaged in a "streaking" incident on campus. Both boys were suspended from school. Cozens was of the view that the scholarship opportunity should be taken away, as well. (RT. 495:20-496:15; 497:28-500:14.)

There was significant public response to the incident and to the discipline proposed, including articles in the newspapers, editorials, letters to the editor, and public discussion. (RT. 502:8-503:3; 503:28-509:4; Trial Exhibits 93A through 93G.)

Faculty reaction was mixed. (RT. 1014:17-22; 1015:7-14.) Many teachers sought to change the principal's mind by presenting him with a petition. (RT. 509:9-28.) August decided to approach Cozens. Before doing so, August invited the four industrial arts teachers to a meeting in hopes that they would join him in asking Cozens to reconsider. When August found that they would not, the meeting ended. August then verified that the bank had no opposition to the student retaining the award, and, finally, he wrote Cozens a memo requesting reconsideration. When Cozens refused, August dropped the matter. Contrary to petitioners' assertions, Cozens' memo of March 19, 1974 establishes that the meeting occurred *before* Friday, March 15th (i.e. "late last week"), before August wrote Cozens, and before Cozens made his decision final. (RT. 1013:5-1016:8; Memos dated March 19, 1974, March 15, 1974 and March 18, 1974, contained in Exhibit 15.)

g) The Letter to the *Wolfprint*

Before the beginning of the 1974-75 school year, students were invited to attend a *voluntary* assembly. Some older students verbally harassed and embarrassed incoming freshmen in a manner which both August and Cozens found objectionable. August wrote a public letter of apology which was printed in the student newspaper, the *Wolfprint*. He criticized the conduct of the older students and reminded the freshmen that they were not required to subject themselves to such abuse and could, with dignity, walk away from such displays at voluntary assemblies. (RT. 742:23-746:2; Trial Exhibit 69.)

3. Petitioners Retaliated Against Respondent Because He Engaged In Protected Activities

August's letter to the editor (as well as his other public statements) were discussed by Board members on numerous occasions. They were irritated by it. (RT. 12:1-5; 1259:13-1265:23; 1573:18-28; 1581:25-1582:9; 1583:12-1584:16; 1655:12-1657:18.) Board member DeHope questioned whether August should be allowed to continue as dean of boys. He wondered "whether a dean ought to be writing things like that in the newspaper." (RT. 1267:16-24.)

Board member Jouris acknowledged that "everybody" in the Board room was offended by August's letter. She summarized the attitude of the Board:

> I don't think that any business or any school or any people need to have negative things going on in the newspaper . . . . [C]ertainly we were

> concerned . . . . I don't think you solve problems by writing letters to the editorial page.
>
> [RT. 1584:17-1585:13.]

Board member Zuckerman thought August's letter was a "misuse" of what letters to the editor should be used for. (RT. 1724:11-1725:26; 1709:8-1711:3.)

Superintendent Petersdorf read August's letter when the principals called it to his attention. (RT. 1777:14-16; 1781:17-1782:26.) Notwithstanding, August worked well with administrators at other schools. (RT. 919:27-924:4.) Contrary to the reasons given at the hearing, the superintendent acknowledged privately that the true reasons for August's demotion were that he was "an outspoken person." (RT. 84:1-85:10; 88:23-89:6; 90:7-14.)

August also publicly disagreed with the Board's attribution of responsibility for a bond election failure. In response, Board member DeHope promised "[W]e are going to get rid of Boyer August." Principal Cozens was informed of the Board's anger. (RT. 726:19-727:1; 253:28-254:10.) Indeed, Cozens admitted that these complaints underlay his recommendation for August's demotion. (RT. 929:19-930:15; 931:16-934:3.)

4. Respondent's Demotion Did Not Originate With The Principal

August's reassignment did not occur through normal channels. Instead, it was orchestrated from above and dictated to the principal. (RT. 386:12-15; 387:27-388:7; 388:24-389:1.)

Faced with the prospect of reassignment himself (Trial Exhibit 84), in the fall of 1974 Cozens made a "deal" with the superintendent to get rid of August. He was assured favorable treatment in exchange. (RT. 386:12-15; 387:27-388:7; 388:24-388:1; 935:18-936:27; 846:18-847:3; 852:9-23; 853:9-857:9; 881:25-882:4; Trial Exhibits 10A and 10B.)

The principal began meeting with the district's legal counsel to secure advice on how to prepare a case against Boyer August. (RT. 741:5-742:6.) The superintendent and his right-hand man, assistant superintendent Solberg, directed Cozens on what to criticize about August's conduct. (RT. 1778:22-1779:14; 740:19-28; 747:20-748:9; 1797:24-1798:22.)

When August's letter to the *Wolfprint* appeared, Solberg protested to Cozens of August's "public criticism of his colleagues or of students." (Trial Exhibit 18A.) Cozens personally agreed with August. Nonetheless, he bowed to the assistant superintendent's wishes and soon listed August's letter a reason for potential reassignment. (RT. 747:10-751:11; 745:4-746:2.)

Ever since August's public comments to the Board concerning the bond election, rumors had circulated in the community that August was targeted for reassignment. (RT. 1016:9-1019:22.) August asked Cozens whether there was substance to the rumors. Cozens initially refused to reply. (RT. 1030:26-1031:23.) After consulting with assistant superintendent Solberg and the school district's attorney, Cozens finally delivered a letter to August confirming the substance of the rumors. (RT. 831:20-833:2; 1031:20-1033:2; 1815:26-1817:25; Trial Exhibit

501.) Obvious among the thirteen items listed for reassignment was Solberg's criticism of August's letter to the *Wolfprint*, newly voiced by Cozens. (RT. 750:2-751:11.)

The following February, when Cozens formalized his reassignment recommendation, he followed a "script" carefully prepared by the superintendent and Solberg. (RT. 846:18-852:8.)

Although August was led to believe that the Board still had an open mind (RT. 1830:13-16; 1040:21-23), in fact, the decision to reassign him had already been made (RT. 575:7-576:10; 589:14-27; 590:16-25; 595:9-12; 608:10-24). And although this was known to Cozens (RT. 1533:16-1534:11), he nonetheless participated in the March 17, 1975 hearing to lend substance to the seven reasons drafted by the superintendent. (RT. 856:21-857:9.)

After the hearing, the Board formally recorded their vote to reassign August. (RT. 1702:21-25.) Inasmuch as the decision had already been made long before, Board members wondered why the hearing was held. (RT. 1704:23-28; 590:2-591:1; 1277:24-1278:8.)

5. In Fact, Respondent Did His Job

The job of "high school dean" in the San Ramon School District is defined in a job description adopted by the Board of Education. Among the duties assigned to the dean were responsibility for students' attendance, behavior and welfare; assisting staff with student discipline and attendance problems; and assisting with teacher supervision. (RT. 662:12-623:27; Trial Exhibit 94.)

a) Attendance

The official attendance record of the district was the teacher's grade book. When a student missed three classes, the teacher was required to report those absences to the dean. The dean's response to each situation would largely depend upon the individual circumstances of the student. That would vary from student to student, time to time, and dean to dean. It would often involve talking with the student and the teacher involved, and possibly talking with others as well. The procedure was not fixed and the deans were given considerable discretion. August did his job well and received more referrals than the dean of girls. (RT. 1827:24-28; 890:5-892:12; 1861:26-1862:7.)

b) Behavior

The teacher was assigned primary responsibility for student behavior. In an unusual case, teachers were authorized to refer the student to "the appropriate counselor, guidance consultant and/or administrator." (RT. 1839:18-1840:18; 1841:21-1842:8.) Sometimes teachers attempted to use the dean as a "scapegoat" to pass off problems that they themselves had created. (RT. 929:2-7.) However, a referral was only appropriate where the teacher could not alone control the student's behavior. (RT. 627:27-628:6.) When a referral was made, it was appropriate for the dean to act "in *loco parentis*." (RT. 1839:8-17.)

It was important for the dean to talk with "both sides." (RT. 629:7-10.) The discipline policy did not assume that the teacher was always right. In fact, the

teacher was not always right. (RT. 887:24-888:1.) It was appropriate for the dean to point out to the teacher how the teacher had contributed to the difficulty, in hopes of effecting a change in the teacher's behavior. (RT. 889:5-15.)

c) Welfare of the Students

According to the superintendent, the role of dean "changes day by day as the circumstances demand." The dean did *not* work closely with the principal, but rather "primarily . . . with students." The dean's contact with the principal was to communicate information regarding "problems in the school" or "areas of concern." The dean had to be an advisor and consultant to the students (RT. 1842:14-1843:15) and had to represent "all of the points of view of the students" - students from broken homes, students with physical or emotional disabilities, students with alcohol problems, students with drug problems, and students with difficulties in their maturity and self esteem. It was part of the dean's job to identify each child's problem, and to try to deal with it, both in the short term and in the long term, as well. (RT. 635:10-636:1; 688:28-690:1.)

Official school policy dictated that the optimum development of each student's potential was the goal of the district, and that policy directed the deans to "keep the needs of the students uppermost in their minds." (Trial Exhibit 30; RT. 697:17-698:28.) It was acknowledged that the dean, along with other administrators, had responsibility for raising professional standards in the

school environment, protecting the health and safety of the students, honoring the integrity of the students, and reporting violations of these standards to the principal. (RT. 680:18-682:7; 683:16-18; 684:22-685:14; 691:5-692:10.)

d) Additional Activities Encouraged by the Principal

Cozens' commendations of August's job performance suggest the breadth of activities which August was encouraged to undertake.

In January and April of 1971, Cozens complimented August for being "open and honest" and for offering suggestions in areas beyond discipline and attendance. (RT. 1406:24-1407:25.)

On December 10, 1971, only four days after August submitted his report on the meetings between the student committee and the Boys' P.E. Department, Cozens complimented August for working with other staff to make the rules and regulations more relevant and acceptable. He complimented August for expressing and trying out new ideas and using the staff as a sounding board. (RT. 1403:24-28; 1405:6-1406:20.)

In March of 1972, he complimented August for following through on "self initiated tasks," for "obtain[ing] information or facts as needed," and for working cooperatively with the other dean. (RT. 1407:26-1408:8.)

In July of 1972, he complimented August for increasing supervision of teachers regarding their attendance responsibilities and for confronting "those teachers who are not doing their job." (RT. 1408:9-19.)

In June of 1973, he complimented August for concerted effort to improve attendance reporting procedures:

> [H]e made significant improvement with some selected teachers who had severe deficiencies in reporting attendance . . . [including] . . . one hundred percent improvement in the attendance procedures of the Boys' P.E. Department.

He complimented August for working with outside agencies, including administrators at other schools, and for his "enthusiasm and efficiency" in matters beyond discipline and attendance. (RT. 1408:20-1410:7.)

In April of 1974, Cozens complimented August for continuing to improve communications with teachers, students, and parents. (RT. 1410:19-1411:18.)

6. Respondent's Relations with Staff were Similar to his Predecessor's Relations with Staff

The jury was able to compare the district's treatment of August with that given to his predecessor, Michael Halloran. (RT. 1445:13-17; 1445:27-1446:6.)

Halloran, like August, had differences with many staff members. (RT. 1448:3-7.) Sometimes poor teacher judgment caused student discipline problems. In such situations, it was the dean's responsibility to confront the teacher, in addition to dealing with the student. (RT. 1448:3-7; 1448:24-1449:25; 642:23-643:17.)

Halloran, like August, found it necessary to investigate the facts when a student complained that a teacher's conduct had precipitated a referral. (RT. 1447:10-19; 1451:6-1452:5.) Like August, he did not always get the

cooperation he wanted. (RT. 1452:10-1454:26; 633:7-27; 637:20-27)

Halloran estimated that when students were sent to him for discipline, in up to 25% of the cases "it was due to 'poor teacher judgment'." (RT. 1455:3-9.) The job of dean is difficult because the dean is "always in a conflict situation with somebody." (RT. 629:7-23.)

August and Halloran were met with hostility from the Boys' P.E. Department because the type of students that the deans worked with were typically "not jocks." (RT. 474:6-26.) August's response to discipline referrals conformed to district policy, and to Halloran's practice, as well. (RT. 891:7-982:20.) Occasionally, teachers were unhappy with the level of discipline that August imposed, but at least 90% of the time he was able to support the teacher; and in only 8% to 10% of the cases did he find it necessary to inquire further. (RT. 893:6-17; 983:24-985:4.)

August listened to both sides, communicated honestly, and he did not act with bias or prejudice toward either side. (RT. 475:16-476:19.) With regard to student rights, "he was very fair" and wanted things done "by the book." (RT. 557:28-559:16.) He attempted to work out positive solutions to problems. (Rt. 470:16-20.)

7. The Isolated Criticism in the March 1972 Evaluation was Quickly Overcome by Positive Assessments

The principal did not criticize August for granting Christmas clemency until his evaluation the following

spring. (RT. 988:15-20.) However, one month after the evaluation, Cozens wrote of August:

> Boyer has done an excellent job . . . He has enforced the rules and regulations of both the school and district and, where necessary, had these rules changed because of changing student attitudes, or of the practicalities of proper enforcement.
>
> * * *
>
> Boyer is very concerned about student welfare and learning atmosphere of the school (sic). He has spent time working with the Faculty Senate and individual teachers in improving the understanding of students and their problems. He has come up with new ideas on improving our attendance and other procedures.
>
> * * *
>
> This young man has all the characteristics that make for an excellent school administrator. He has the intelligence, training, personality, enthusiasm, energy, drive, verbal skills, organizational skills and follow-up that are so necessary for success in this occupation.
>
> [RT. 915:28-919:14.]

In July of that year, Cozens officially commended August:

> Boyer has increased his supervision of teachers in regards to their attendance responsibilities. He has confronted those teachers who were not doing their job . . . .
>
> * * *
>
> Boyer continued his work with the committee on revising the Teacher handbook, and turned in the revised draft before school was out. This work included some major recommended revisions.

* * *

> Boyer worked continually with small groups, having positive meetings with these groups throughout the semester. He had many positive individual cases involving boys with problems, and solved all without reference to the principal for final decision. He provided more supervision on the campus and worked hard to alleviate some problem areas on the campus, both before school and at lunch time.
>
> [RT. 905:17-907:8.]

Thereafter, Cozens recommended August for re-employment as dean of boys "without reservations," knowing that re-employment would grant August tenure within the district. (RT. 821:3-12; 822:8-823:13; 824:2-10; 1673:5-20.)

Cozens made no effort to have August reassigned until moved to do so by the superintendent. (RT. 737:17-742:20.)

8. The Petition of Some Staff Members Was After the Fact and Its Validity Was Suspect

After the superintendent's recommendation for August's reassignment was announced, the "Old Guard" faction leader Thomas O'Gorman circulated a petition requesting teachers to support Cozens' presentation to the Board. O'Gorman and Cozens were close, and O'Gorman knew that August's reassignment was already decided. O'Gorman did not care for August; in the past, O'Gorman himself had failed to follow school policies with regard to reporting attendance, and it had been necessary for August to speak to him on at least two separate occasions. (RT. 1533:16-1543:11; 1857:24-1858:16.)

Cozens' own reassignment had not yet been made public, and the staff expected him to continue as principal. Subtle pressure was exerted on the staff to sign the petition. (RT. 893:18-894:6.) Less subtly, O'Gorman put direct pressure on some staff members to sign the petition. (RT. 1855:28-1856:3; 1857:8-23.) Feelings were mixed about August. Some teachers disagreed with August's publicly expressed philosophy of student rights. (RT. 552:10-524:10.) Other teachers felt that August was being reassigned because he had questioned the abusive practices in the Boys' P.E. Department. Many teachers and parents responded on August's behalf. (Numerous letters are contained in Trial Exhibits 11 and 16.) Many teachers and parents objected to the "termination movement," because "August has brought a good deal of improved student behavior" to San Ramon High. (RT. 299:11-23; 302:27-304:21.)

II.

THE PETITION SHOULD BE DENIED

A. Petitioners Seek Review of an Unpublished Decision of an Intermediate Level State Court

Petitioners incorrectly address their petition to the Supreme Court of California. However, since the Supreme Court of California merely denied review of the decision of the Court of Appeal of the State of California, the petition should have been addressed to that intermediate court. *Callender v. Florida*, 380 U.S. 519 (1965), 383 U.S. 270 (1966).

The decision of the Court of Appeal was an unpublished opinion. (See Petition, page A-3, Appendix C.) Rule 977 of the California Rules of Court provides in pertinent part as follows:

> **Rule 977. Citation of Unpublished Opinions Prohibited; Exceptions**
>
> **(a) [Unpublished Opinions]** An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).
>
> **(b) [Exceptions]** Such an opinion may be cited or relied on:
>
> (1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or
>
> (2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

Under Rule 977, the lower court decision in this case has no impact on anyone except the parties, and it has often been noted that the Supreme Court of the United States does not sit "for the benefit of the particular litigants." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 348 U.S. 880 (1954), 349 U.S. 70, 74 (1955). Accordingly, as petitioners in this case seek review of an unpublished decision of an intermediate level state court, a decision which concerns only themselves, respondent respectfully submits that the petition should be denied.

B. The Lower Court Decision Carefully Applies Standards Set by the United States Supreme Court

Petitioners have set forth their arguments in the manner of a brief on the merits, as if this were an appeal as a matter of right. Petitioners give short shrift to the factors which the Court considers in deciding whether to grant certiorari. In fact, petitioners simply assert:

> Confusion exists in lower courts on the application of the standards of this Court set forth in *Connick v. Meyers* [sic] (1983) 461 U.S. 138, as displayed most prominently in this case. . . . (Petition, pp. 8-9.)

Petitioners do not cite one published opinion, state or federal, to demonstrate this alleged "confusion."

Respondent contends that there is no "confusion" in the law governing this case. The decision of *Connick v. Myers*, 461 U.S. 138 (1983), sets forth a clear test governing when a public employee may be punished for speaking out in the workplace. Many decisions have followed *Connick*, applying the *Connick* constitutional analysis to a variety of unique factual situations. However, petitioners have not demonstrated the "real and embarrassing conflict of opinion and authority" which must be demonstrated in a petition for certiorari. *Layne & Bowler Corp. v. Western Well Works, Inc., et al.*, 261 U.S. 387, 393 (1923).

Even if there were any confusion in other cases applying the *Connick* test, the decision in this case certainly demonstrates no such confusion. (See unpublished opinion of the Court of Appeal, Petition, pp.A-3 through

A-26, Appendix C.) The lower court accurately and lucidly described the *Connick* test, and applied the *Connick* test to the facts of this case with scrupulous fidelity. Petitioners have not set forth one criticism of the lower court's formulation of the *Connick* test. Petitioners simply dispute the "application" of the test to the complex and unique facts of this case. Such a dispute is not a basis for granting certiorari.

Accordingly, respondent respectfully submits that the petition should be denied.

C. Petitioners Seek Review of Factual Issues Which Have Already Been Given De Novo Review by an Appellate Court

It is interesting to review petitioners' "Questions Presented." Each of the six questions asks whether a specific example of political speech (described with a transparent bias) is protected under the First Amendment. Each of the six questions is, primarily, addressed to an interpretation of the facts of the case.

In *Connick v. Myers*, 461 U.S. 138 (1983), the Court noted:

> Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, *as revealed by the whole record.* [Emphasis added; 461 U.S. at 147-148]

Thus, to address petitioners' Questions Presented, this Court would have to embark on an exhaustive review of factual interpretations which are complex and unique. The Court has routinely declined to perform this

sort of review, particularly where, as in the case at bar, an intermediate court has already reviewed the evidence at trial. *Branti v. Finkel*, 445 U.S. 507, 512, fn.6 (1980). Accordingly, respondent respectfully submits that the petition should be denied.

D. Petitioners Have Mischaracterized The Facts

Petitioners correctly recognize that:

> 'The focal point of this case is whether defendants reassigned August in retaliation for his exercise of his First Amendment rights.'
>
> [Petition, p.9, quoting from decision of Court of Appeal, Appendix C, p.A-11.]

Respondent's letter to the editor, his public statements regarding parent and student rights, his adult education classes, his meetings with the Green Valley Parents and his support of students in the faculty assembly all encouraged legitimate citizen participation in the educational process. Although administrators and teachers were worried by the focus of attention placed upon them, and some disagreed with his views, no consequences adverse to the public good were demonstrated.

Petitioners' suggestion that August misrepresented District policy (Petition, pp.27-28) when he spoke with the Green Valley Parents is not borne out by the record.[2]

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[2] August stated the rules. The superintendent may not have wanted the parents to know what the rules allowed. But that is not misrepresentation.

The truth is that the superintendent did not like *anything* that August did, and created circumstances to fault August's behavior.

August's criticism of Cozens was honest, accurate and civilly communicated. He was by no means alone in his conclusions. It provided Cozens opportunity for self appraisal and self direction. The administration of the school went on, substantially unchanged.[3]

August's recommendations to the principal regarding the P.E. program and his later referral of four students to the principal focused administrative attention on situations which needed to be addressed. In each instance, changes occurred to improve the *status quo*.

August's communications to the Board were nothing more than philosophical or factual disagreements. They did not interfere with his job or the overall well-being of the school.

Petitioners also misstate the sequence of events concerning the "streaker" (Petition, p.21). In fact, August did not call the meeting with the industrial arts teachers *after* receiving Cozens' final decision, but *before*.

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[3] Petitioners misinterpret the Court of Appeal (Petition, pp.A-3 - A-26; Appendix C) when they quote: "August's criticism had to affect the relationship between August and Cozens." (Petition, p.19.) Petitioners interpret that as a statement of fact. Indeed, the context makes it clear that it is a statement of what petitioners had to establish. The court went on: "Cozens stated August's comments upset him; however, he also stated that in the best interest of the school, he continued to maintain a professional relationship with August. There is no evidence that August's comments impeded his ability to perform his own duties." (Petition, p.A-16.)

The significance placed by petitioners on August's "*Wolfprint* letter" strains credulity. The assembly occurred before classes had begun. It was a *voluntary* assembly (and August's letter so noted) from which students were free to come and go. The most interesting aspect of this incident is that Cozens himself agreed with August until the superintendent's office seized upon the publication as a basis for getting rid of him.

E. Petitioners Confuse "Protected" And "Unprotected" Conduct

The petitioners paint a smeary picture in an attempt to distort this Court's focus on the specific facts identified by the trial judge as "protected." Their brief frequently mixes "unprotected" conduct with the "protected" conduct, and draws conclusions at odds with the findings of the trial judge and jury. For example, petitioners' depiction of August's relations with staff as "advocacy of student rights" (Petition, p.25) is a mischaracterization. The trial and appellate courts correctly distinguished August's advocacy from August's relations with staff. (See decision of Court of Appeal, Petition, Appendix C, p.A-14, fn.6, and p.A-17, fn.8.)

Petitioners would lead this Court to believe that "August had running battles of bickering and insults with the Boys' P.E. Department which were declared by the Court of Appeal to be protected." (Petition, p.22.) This is simply untrue. The trial court and the Court of Appeal declared August's relations with staff to be unprotected. (Petition, p.A-17, fn.8.) The Court of Appeal

held that only August's *reports* to Cozens concerning the Boys' P.E. Department were protected. (Petition, p.A-17.)

Petitioners assert that "[t]he District was entitled to define the proper role of dean. August attempted to change the basic role of his job." (Petition, p.25.) In fact, the dean's job was well described by the superintendent and the previous dean as being quite consistent with that performed by August. As pointed out by the Court of Appeal, " . . . defendants' argument fails to accurately distinguish protected conduct from unprotected conduct." (Petition, p.A-20.) The court concludes: "These instances of [protected] conduct had little direct impact on the day-to-day operation of the school." (Petition, p.A-21.)

F. The Petition Is Untimely

The issues raised by petitioners herein should have been raised at the time of the first appeal in this case. (See unpublished decision of the Court of Appeal of the State of California, First Appellate District, Division One, 1 Civil 46068, filed March 22, 1982, in which the Court of Appeal determined that " . . . arguably, portions of [August's] conduct was [sic] entitled to constitutional protection and should not have been punished." Decision, p.21.) Instead, petitioners accepted retrial of the facts. If there was a time to seek higher review of that ruling, it was then, and not now.

III.

CONCLUSION

Petitioners make no attempt to show that this is a case where certiorari should be granted. Petitioners simply seek yet another appellate review of factual determinations based on a complex and unique set of facts, factual determinations of concern only to the parties in this case. Accordingly, respondent respectfully submits that the petition should be denied.

DATED: August 24, 1989.

Respectfully submitted,

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